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IN THE
COURT OF APPEALS OF INDIANA

TRENT BUFFINGTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0511-CR-535
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0310-FA-28

September 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Trent Buffington appeals the sentence imposed for his conviction of Child Molesting[1] and Sexual Misconduct With a Minor,[2] both class C felonies. Buffington pled guilty to both offenses. Buffington presents the following restated issue for review: Did the trial court err in sentencing him?[3]

We affirm.

The facts are that over a period of several years beginning early in 2000, Buffington had repeated sexual contact with his daughter, A.B., who was between the ages of ten and fourteen during that time. Included in those acts were fondling, intercourse, and oral sex. Sometime in October 2003, A.B. reported Buffington's actions to her mother, Kathleen Buffington, who had by then divorced Buffington. Kathleen reported A.B.'s allegations to police and an investigation ensued. As a result of the investigation, Buffington was charged with two counts of child molesting, two counts of sexual misconduct with a minor, and incest. On July 8, 2005, Buffington and the State reached a plea agreement whereby Buffington would plead guilty to one count each of

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[1] Ind. Code Ann. § 35-42-4-3 (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006).

[2] I.C. § 35-42-4-9 (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006).

[3] The State addresses what it characterizes as Buffington's argument that his sentence violates *Blakely v. Washington*, 542 U.S. 296 (2004). Buffington does indeed invoke *Blakely*, but in name only. His entire "argument" on that point consists of the following sentence: "The Supreme Court of the United State held that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Appellant's Brief* at 8 (quoting *Blakely v. Washington*, 542 U.S. at 301). Buffington does not explain how his sentencing ran afoul of *Blakely*, if in fact he intended to challenge it in that respect. Thus, we will not address the question of whether his sentencing conformed with *Blakely's* mandates.

child molesting and sexual misconduct with a minor, in exchange for which the State would drop the remaining charges. The parties agreed they would submit arguments as to the appropriate sentence, that the sentences would not exceed six years for each count, and that the sentences for each count would be served consecutively. In pleading guilty, Buffington stipulated to the following facts:

* * * * *

> 2. That [A.B.] is the victim in Cause # 45G04-0310-FA-00028.
>
> 3. That [A.B.] is the biological daughter of Trent Buffington.
>
> 4. That [A.B.] turned fourteen (14) years of age in April 2003.
>
> 5. That between February 1, 2000 and April 10, 2003, defendant did knowingly or intentionally perform or submit to fondling or touching of [A.B.], a child under fourteen (14) years of age, with intent to arouse or satisfy the sexual desires of defendant or [A.B.].
>
> 6. That between April 11, 2003 and August 23, 2003, defendant, being at least twenty-one (21) years of age, did perform or submit to fondling or touching of [A.B.] with intent to arouse the sexual desires of defendant or [A.B.], a child at least fourteen (14) years of age but less than sixteen (16) years of age.

Appellant's Appendix at 49.

At the September 29, 2005 sentencing hearing, the court first recited what amounted to the factual bases of the offenses, which it labeled as "the nature and circumstances of the crime." *Transcript of Sentencing* at 59. After that, the court continued:

The further considerations are the nature and circumstances that this was an ongoing situation that happened to [A.B.] between the ages of ten and fourteen years of age, over a four year period.

The defendant's character is assessed as "controlling" based on the defendant's two domestic battery convictions. An oral statement made by the victim's mother has been considered as was stated in open court. The Court is expressly rejecting the following mitigators: The character and attitude of the defendant indicating he is unlikely to commit another crime because he has expressed remorse, which the Court accepts while the defendant is making great strides toward rehabilitation and the recently joined sexual offender group, these events occurred over a period of four years with ample time for deliberation.

Furthermore, the Court is expressly rejecting the mitigating factor of the crime is circumstances unlikely to reoccur for the same reason. This occurred over a period of four years, with ample time for deliberation. The Court does find or the Courts [sic] is expressly rejecting the mitigator of imprisonment of the defendant will result in undue hardship to the defendant. Imprisonment will result in hardship to the defendant, although not undue.

The Court is accepting the following mitigators. The defendant pled guilty and accepted responsibility with a cap on the sentence on a reduction in the charges. The Court further finds in mitigation that the defendant has sought out sexual offender treatment within the last two months and is making progress.

In aggravation, the defendant has a history of criminal convictions. In 1994, the defendant was convicted of domestic battery, a misdemeanor, received one year of probation. In 1998 the defendant was convicted of domestic battery, received one year of probation. In further aggravation, the Court finds prior leniency has not deterred the defendant's behavior. The defendant was given probation in the past, these or this offense occurred thereafter.

The Court further finds that the defendant is in need of correctional and rehabilitative treatment that can best be provided by treatment in a penal facility because of the defendant's past convictions. The courts in this county have attempted to intervene in the defendant's criminal behavior, namely the controlling aspect of his personality and giving him probation. This offense occurred thereafter. The court is further considering the aggravator of the victim's age. That this occurred between the ages of ten and thirteen and then after she turned fourteen. In further aggravation, the Court is considering that the defendant was in a position of trust. The defendant is the biological father of the victim, by his own

> admission. The specific facts being considered by the Court are the nature and circumstances of the crime that the Court is attaching additional aggravating weight. The fact that this occurred for a period of four years, again with ample time for deliberation during that four year period is more than the minimum elements required to convict for the crimes of Child Molesting and sexual misconduct by [sic] a minor and that is being considered from the facts stipulated in the factual basis and as admitted to by the defendant.

Id. at 60-63. The court found the aggravators outweighed the mitigators and imposed consecutive, five-year sentences for each conviction, for a total executed sentence of ten years.

Buffington contends the trial court erred in sentencing him. Specifically, he contends the trial court identified improper aggravators in enhancing his individual sentences to five years each. We pause at this point to note that this court has recently wrestled with the question of which sentencing statute applies when a defendant is sentenced for a criminal conviction – the one in effect at the time the offense was committed or the one in effect at the time of sentencing. This question arose because on April 25, 2005, in response to *Blakely v. Washington,* 542 U.S. 296, our legislature amended the sentencing statutes to replace "presumptive" sentences with "advisory" sentences. Under the new scheme, a court may impose any sentence authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code Ann. § 35-38-1-7.1(d) (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006). Although there is authority to the contrary, *see Samaniego-*

Hernandez v. State, 839 N.E.2d 798 (Ind. Ct. App. 2005), we subscribe to the view that the statute in effect when the offenses were committed, as opposed to the one in effect at the time of sentencing, applies. *See Creekmore v. State*, No. 43A03-0509-CR-466 (Ind. Ct. App. September __, 2006); *Weaver v. State*, 845 N.E.2d 1066 (Ind. Ct. App. 2006), *trans. denied*; *Banks v. State*, 841 N.E.2d 654 (Ind. Ct. App. 2006), *trans. denied*. Therefore, we apply the "presumptive" version of the statute.

Sentencing matters are committed to the trial court's sound discretion and will be accorded great deference on appeal. *Edwards v. State*, 842 N.E.2d 849 (Ind. Ct. App. 2006). We will reverse such determination only for an abuse of discretion. *Id*. When the trial court imposes a sentence other than the presumptive, we will examine the record to insure that the trial court explained its reasoning process. *Id*. When considering a non-*Blakely* challenge to an enhanced sentence, we first determine whether the trial court issued a sentencing statement that identified all significant mitigating and aggravating circumstances, explained specifically why each circumstance is determined to be mitigating or aggravating, and articulated the court's evaluation and balancing of those circumstances. *Banks v. State*, 841 N.E.2d 654.

In the instant case, Buffington does not allege the trial court failed to find proper mitigators, but instead challenges the propriety of some of the aggravating circumstances. To the extent he challenges the balancing process, it is that the court identified and considered improper aggravators. Buffington challenges the use of his criminal history as an aggravator. Buffington's criminal history consists of two domestic battery

convictions, both of which occurred in the mid- to late 1990s. It would appear that Buffington's primary objection is those convictions are not significant enough to consider aggravating because they were not the same type of offense for which be was being sentenced in the instant case. Citing *Edmonds v. State*, 840 N.E.2d 456 (Ind. Ct. App. 2006), *trans. denied*, *petition for cert. filed* (U.S. June 17, 2006) (No. 06-248), he explains, the "prior convictions for domestic battery are not related to the instant offenses and therefore cannot be categorized as a significant aggravating circumstance." *Appellant's Brief* at 8.

We first observe that the court did not identify Buffington's criminal history as "significant." It was merely listed as one of the aggravators. Moreover, we can find no authority for the proposition that in order to be a valid aggravator, the criminal history must consist of crimes that are substantially similar to the instant crime. *Edmonds* certainly does not stand for that proposition. Rather, the defendant's criminal history is a valid consideration because it reveals the defendant's propensity for illegal or antisocial behavior in that respect. In this case, Buffington was convicted on two separate occasions of battering members of his family. Granted, there is no indication in the record that the rude, insolent, or angry touching, *see* I.C. § 35-42-2-1 (West, PREMISE through 2006 Public Laws approved and effective through March 15, 2006), that formed the bases of those offenses was sexual in nature. This does not mean, however, that those actions were not relevant to the court's deliberations in sentencing Buffington for the instant crimes. Among other things, they revealed Buffington's propensity to mistreat

vulnerable members of his household. The trial court did not err in citing this as an aggravating circumstance.

Buffington next complains the trial court erred in citing the victim's age as an aggravating factor. Our Supreme Court has stated, "when the age of the victim constitutes a material element of the crime, then the victim's age may not also constitute an aggravating circumstance ...." *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001). In the same case and discussing the same issue, however, the Court also noted, "the trial court may properly consider the particularized circumstances of the factual elements as aggravating factors." *Id.* at 539. Thus, where appropriate, age may serve as a valid aggravator even where it is a material element of the crime, so long as the trial court explains why it considers the victim's age to be particularly aggravating. In this case, the trial court merely stated the following in that respect: "The court is further considering the aggravator of the victim's age. That this occurred between the ages of ten and thirteen and then after she turned fourteen." *Transcript of Sentencing* at 62. Clearly, those comments do not constitute an explanation of why the trial court considered the victim's age of between ten and thirteen to be particularly aggravating. Therefore, the trial court erred in identifying A.B.'s age as an aggravator. *See Johnson v. State*, 845 N.E.2d 147 (Ind. Ct. App. 2006) (appellate court found error where the trial court cited the age of the ten-year-old victim of child molesting as an aggravator, but did elaborate its reasoning).

The trial court cited as an aggravator that Buffington occupied a position of trust with respect to A.B. It is well settled that occupying a position of trust with respect to the victim is a valid aggravating circumstance. *See Hart v. State*, 829 N.E.2d 541 (Ind. Ct. App. 2005). As we noted in *Hart*, "[t]here is no greater position of trust than that of a parent to his own young child." *Id*. at 544. While acknowledging that abusing a position of trust may be a valid aggravator, Buffington claims it was not proper here because "there was no statement from the victim alluding to this aggravator." *Appellant's Brief* at 9. Moreover, he notes, A.B. "did not appear, nor did her therapist testify, and she informed defense counsel that she did not care if her father returned to jail because he was not bothering her anymore." *Id*. We are at a loss to understand how those assertions, even if true, negate Buffington's position of trust as an aggravator. This was a valid aggravating circumstance.

Finally, Buffington contends the trial court erred in finding as an aggravator that Buffington was in need of correctional and rehabilitative treatment that was best provided in a penal facility. In *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005), our Supreme Court held this aggravator was improper because the trial court failed to explain *why* the defendant was in need of rehabilitative treatment that could best be provided by a penal facility. In so holding the court observed that because every executed sentence involves incarceration, there must be a specific and individualized statement explaining why extended incarceration is appropriate. *Id*. Here, the trial court's explanation included the statement, "because of the defendant's past convictions." *Transcript of Sentencing* at 62.

This would not be sufficient to satisfy *Cotto*'s articulation requirement. The trial court went on to note, however, that Buffington had been placed on probation on two previous occasions, yet continued to re-offend. This explanation is sufficient to satisfy the *Cotto* requirement. Therefore, the trial court did not err in citing this aggravating circumstance. *See Loyd v. State*, 787 N.E.2d 953 (Ind. Ct. App. 2003).

Having found an irregularity in that the trial court erred in citing A.B.'s age as an aggravator, we may proceed in one of three manners. We can remand to the trial court for a clarification or new sentencing determination, affirm the sentence if the error is deemed harmless, or independently reweigh the proper aggravating and mitigating circumstances. *Banks v. State*, 841 N.E.2d 654. We opt for the third alternative.

The surviving proper or unchallenged aggravators are (1) Buffington's criminal history, (2) Buffington occupied a position of trust with the victim, (3) the nature and circumstances of the crime, and (4) the need for corrective and rehabilitative treatment best provided in a penal facility. With respect to Buffington's criminal history, we note the trial court cited the fact that Buffington committed the instant offense despite having participated in remedial and rehabilitative social programs offered by the county and the State. These comments are legitimate observations about the weight to be given to Buffington's criminal history, although they do not themselves serve as separate aggravating circumstances. *See Morgan v. State*, 829 N.E.2d 12 (Ind. 2005). Also, our Supreme Court has generally held that the significance of a criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the instant offense.

See id. Taking all this into account, we assess Buffington's criminal history in the low-to-medium range, as it consists of two convictions that were, like the instant case, based upon mistreatment of female members of Buffington's household.

The next aggravator is that Buffington abused a position of trust with his victim. The court has said on a previous occasion that "[a]busing a position of trust is, by itself, a valid aggravator which supports the maximum enhancement of a sentence for child molesting." *Hart v. State*, 829 N.E.2d at 544. We place this aggravator in the high range.

Finally, the trial court cited the nature and circumstances of the crime. The evidence revealed that Buffington molested A.B. many times over a period of approximately four years. The sheer number of molestations, coupled with the span of time over which they occurred, places this aggravator in the medium to high range.

In mitigation, the trial court cited Buffington's guilty plea and the fact that he sought sexual offender treatment and was making progress in that regard. Although Buffington benefited from his bargain, his guilty plea did spare the State the time and expense of a trial, and also spared A.B. the ordeal of having to testify in such proceedings. His participation in sex-offender treatment represents at least a step in the direction of gaining control of his aberrant behavior. We assess both mitigators in the medium range.

We find that the aggravators outweigh the mitigators and thus that enhanced, if not maximum, sentences are appropriate. Therefore, we ultimately agree with the trial court's determination that Buffington should receive enhanced, five-year sentences for

each conviction. Pursuant to the plea agreement, those sentences should be served consecutively.

Judgment affirmed.

BARNES, J., and MATHIAS, J., concur.